CHIA YAN TEK & ANOR

v.

NG SWEE KIAT & ANOR

FEDERAL COURT, KUALA LUMPUR
MOHAMED DZAIDDIN CJ
STEVE SHIM CJ (SABAH & SARAWAK)
HAIDAR MOHD NOOR FCJ
[CIVIL APPEAL NO: 02-03-98(B)]
10 AUGUST 2001

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Appeal heard by quorum of three judges and judgment pronounced in open court after two judges had retired - Validity of judgment - Whether appeal should be reheard - Courts of Judicature Act 1964, s. 78 - Rules of the Federal Court 1995, rr. 63, 137*

CIVIL PROCEDURE: *Judgment - Effective date of judgment - Whether date of giving judgment or date of pronouncement in open court - Courts of Judicature Act 1964, s. 78 - Rules of the Federal Court 1995, r. 63*

CIVIL PROCEDURE: *Judgment - Federal Court - Judgment pronounced in open court after two out of three judges who heard appeal had retired - Whether judgment valid in the circumstances - Courts of Judicature Act 1964, s. 78 - Rules of the Federal Court 1995, rr. 63, 137*

CIVIL PROCEDURE: *Jurisdiction - Federal Court - Power to review own decision - Rules of the Federal Court 1995, r. 137*

The appellants as plaintiffs had sought a declaration in the High Court that their transfer of 100 shares of Peringkat Juta (M) Sdn Bhd to the respondents was null and void by reason of fraudulent misrepresentation. Their claim was dismissed. Their appeal to the Court of Appeal was also dismissed. However, their appeal to the Federal Court was allowed and judgment was pronounced in open court on 22 December 2000.

In this instance, the respondents claimed that when judgment was pronounced by the deputy registrar in open court on 22 December 2000, the court was not duly constituted as there was only one judge remaining out of the three that had heard the appeal. That was because the other two judges had retired before 22 December 2000. Therefore, as the effective date of judgment was when it was pronounced in open court by virtue of r. 63 of the Rules of the Federal Court 1995 ('the Rules'), the said judgment was a nullity. Against that, the appellants argued that the effective date of judgment was when it is

given by the judge under s. 78(1) of the Courts of Judicature Act 1964 ('the Act') and not when it is pronounced in open court. As two of the judges had signed the decision of the court on 19 December 2000 as required by s. 78, the judgment was not a nullity.

Held:
Per Mohamed Dzaiddin CJ

[1] There was a clear distinction between the giving of judgment under s. 78 of the Act and the pronouncement of the said judgment in r. 63 of the Rules. Section 78 provides that the judgment or reserved judgment shall be given by the remaining judges of the court, not being less than two, and in which case, the court shall be deemed to be duly constituted. That section does not provide the manner in which and the time from when the judgment is to take effect. Rule 63 of the Rules provides the mode of how a judgment is to be delivered, which is, by pronouncement in open court and under para. (2) of r. 63, it may be read by a judge of the court or by the registrar. The Rules have statutory force and are not mere rules of practice.

[2] In *Surendra Singh & Ors v. State of Uttar Pradesh*, it was held that a judgment was the final decision of the court intimated to the parties and to the world at large by formal "pronouncement" or "delivery" in open court. The mode or manner of delivery was not of the essence but it must be done in an open court. The final operative act was that which was formally declared in open court with the intention of making it the operative decision of the court and that was what constituted the "judgment". Therefore, it followed that the effective date of judgment in the present case was the date of pronouncement in open court and not the date when it was signed by the remaining two judges of the court.

[3] The court disagreed with the appellants that it did not have the jurisdiction to hear the present application. Rule 137 of the Rules clearly gave the court the inherent powers to hear any application or to make any order as may be necessary to prevent injustice. The issue of re-opening or reviewing the court's own decision in the present case did not arise.

[Respondents' application allowed; appellants' appeal shall be reheard by a newly constituted panel of the Federal Court.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu-perayu sebagai plaintif-plaintif memohon suatu deklarasi supaya pindaan 100 saham Peringkat Juta (M) Sdn Bhd kepada responden-responden adalah batal dan tak sah oleh sebab salah nyata fraud. Tuntutan mereka ditolak. Rayuan mereka kepada Mahkamah Rayuan pun ditolak. Walaupun demikian, rayuan mereka kepada Mahkamah Persekutuan dibenarkan dan penghakiman diputuskan di mahkamah terbuka pada 22 Disember 2000.

Kini responden-responden menuntut bahawa semasa penghakiman diputuskan oleh timbalan pendaftar di mahkamah terbuka pada 22 Disember 2000, mahkamah tidak ditubuhkan dengan cara sesuai dan berpatutan berdasarkan hanya tertinggal salah satu daripada tiga hakim yang telah mendengar rayuan tersebut. Kedua-dua hakim yang lain telah bersara sebelum 22 Disember 2000. Justeru, oleh kerana tarikh berkuatkuasa penghakiman adalah semasa penghakiman diputuskan di mahkamah terbuka selaras dengan k. 63 Kaedah-kaedah Mahkamah Persekutuan 1995 ('Kaedah-kaedah'), penghakiman tersebut tidak sah. Perayu-perayu berhujah bahawa tarikh berkuatkuasa penghakiman adalah semasa penghakiman diberikan oleh hakim di bawah s. 78(1) Mahkamah-mahkamah Kehakiman ('Akta tersebut') dan tidak semasa penghakiman diputuskan di mahkamah terbuka. Oleh kerana kedua-dua hakim telah menyempurnakan keputusan mahkamah pada 19 Disember 2000 selaras dengan s. 78, penghakiman adalah sah.

Diputuskan:
Oleh Mohamed Dzaiddin HB

[1] Ada perbezaan di antara pemberian penghakiman di bawah s. 78 dan pemutusan penghakiman di bawah k. 63 Kaedah-kaedah. Seksyen 78 memperuntukkan bahawa penghakiman atau penghakiman yang ditangguhkan harus diberikan oleh hakim-hakim yang tinggal yang tidak berkurangan dua untuk mahkamah dianggap sebagai ditubuhkan dengan cara sesuai dan berpatutan. Seksyen tersebut tidak memperuntukkan cara dan waktu penghakiman tersebut berkuatkuasa. Kaedah 63 Kaedah-kaedah memperuntukkan cara pemberian penghakiman, iaitu, secara pemutusan di mahkamah terbuka dan di bawah perenggan (2) k. 63, ianya boleh dibaca oleh hakim dari mahkamah atau pendaftar. Kaedah-kaedah mempunyai kuasa berkanun dan bukan hanya kaedah-kaedah amalan.

[2] Di dalam kes *Surendra Singh & Ors v. State of Utar Pradesh*, ianya diputuskan bahawa sesuatu penghakiman adalah keputusan muktamad mahkamah yang diumumkan kepada pihak-pihak berkenaan dan kepada seluruh dunia secara "pemutusan" atau "pemberian" rasmi di mahkamah terbuka. Gaya atau cara pemberian tidak penting akan tetapi ianya perlu

dibuat di mahkamah terbuka. Perlakuan terakhir yang berkesan adalah mana yang diputuskan secara rasmi di mahkamah terbuka dengan tujuan membuatnya pemutusan berkesan mahkamah dan itulah yang menubuhkan "penghakiman". Justeru, bermaksudnya tarikh berkuasa penghakiman dalam kes ini adalah tarikh pemutusan di mahkamah terbuka dan bukan tarikh penghakiman disempurnakan oleh hakim-hakim mahkamah yang tertinggal.

[3] Mahkamah tidak bersetuju dengan perayu-perayu bahawa mahkamah tidak memperolehi bidangkuasa untuk mendengar permohonan ini. Kaedah 137 Kaedah-kaedah memperuntukkan kepada mahkamah kuasa sedia ada untuk mendengar apa jua permohonan atau membuat apa jua perintah yang perlu untuk mencegah ketidakadilan. Isu membuka semula atau mengkaji semula pemutusan sendiri mahkamah ini dalam kes ini tidak timbul.

[Permohonan responden-responden dibenarkan; rayuan perayu-perayu harus dibicarakan oleh panel baru Mahkamah Persekutuan.]

Case(s) referred to:
Bharat v. R [1959] 3 All ER 292 ***(dist)***
Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd [1985] 2 CLJ 423; [1985] CLJ (Rep) 196 ***(refd)***
Muir v. IRC [1966] 1 WLR 1269 ***(dist)***
Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 ***(refd)***
Ramachandran Suppiah v. PP [1992] 2 SLR 707 ***(foll)***
Surendra Singh & Ors v. State of Uttar Pradesh AIR [1954] SC 194 ***(foll)***
W'Field Fr Co v. Steel Construction Co [1968] NZLR 680 ***(dist)***
Williams v. Natural Life Foods [1998] 2 All ER 577 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 78(1)
Federal Constitution, art. 128(3)
Rules of the Federal Court 1995, rr. 63(2), 137

For the appellants - Dr CV Das (CK Tan & K Mohan); M/s CK Tan & Co
For the respondents - Cecil Abraham (Rishwant Singh); Lovelace & Hastings

[Appeal from Court of Appeal, Civil Appeal No: B-02-821-95]

Reported by Usha Thiagarajah

JUDGMENT

Mohamed Dzaiddin CJ:

This was an application by the respondents to set aside the judgment of this court pronounced by the Deputy Registrar on 22 December 2000 on the ground that it was a nullity.

Background

By a civil suit filed by the appellants in the High Court at Shah Alam, the appellants who were the plaintiffs, sued the respondents, *inter alia*, for a declaration that the transfer of 100 shares of Peringkat Juta (M) Sdn Bhd (the company) by the plaintiffs to the respondents was null and void by reason of fraudulent misrepresentation. At the conclusion of the trial, the learned judge dismissed the plaintiffs' claim with costs. On appeal, the Court of Appeal dismissed the appeal and affirmed the decision of the High Court. The appellants then filed an application to the Federal Court for leave to appeal. On 20 February 1998, leave was granted and the appeal came up for disposal on 3 August 1998 before Tun Mohd Eusoff bin Chin, Chief Justice, Dato' Wan Adnan Ismail, Chief Judge Malaya and Dato' Zakaria Yatim, FCJ. After hearing counsel, judgment was reserved to a date to be fixed.

On 19 December 2000, the parties' solicitors were informed by the Deputy Registrar of the Federal Court that judgment in respect of the above appeal would be pronounced in open court on Friday 22 December 2000 at 9am. The material part of the letter (NSK6) reads:

> Adalah dimaklumkan bahawa keputusan/penghakiman Mahkamah Persekutuan berkenaan dengan rayuan ini akan **diumumkan di hadapan Mahkamah Persekutuan Malaysia di Kuala Lumpur pada hari Jumaat 22 Disember 2000 jam 9.00 pagi.** (emphasis added)

On 22 December 2000, the Deputy Registrar pronounced the judgment of the Federal Court in the presence of counsel for the parties, allowing the appeal of the appellants with costs.

It was a short judgment, devoid of any reasoning, which reads as follows:

> **Decision of the Court**
>
> The Federal Court has agreed that this appeal be allowed with costs to be paid by the respondents in favour of the appellants here and in the courts below and further made the following consequential orders.
>
> a) That the respondent do within 14 days of this order cause their Company Secretary to hand over the statutory books and documents of the company to the appellants.
>
> b) That the respondent do forthwith execute the Memorandum of Transfer in respect of all the shares in the respondent's company in favour of the appellants and to hand the seal together with their respective share certificates to the appellants.

c) That the respondent and the Company do pass the requisite resolutions and further do all acts, deeds or documents necessary to give effect to the aforesaid orders.

d) That in the event of the respondents and/or the Company Secretary failing to carry out and fulfil any of the order stated herein the SAR of the High Court is empowered to carry out such acts.

Sgd.
MOHD EUSOFF CHIN
19/12/2000

Sgd.
WAN ADNAN ISMAIL
19/12/2000

On 29 December 2000, the appellants' solicitors submitted to the Federal Court Registry a draft copy of the order, the relevant part of which states as follows:

KORAM: YANG AMAT ARIF TUN DATO' SERI HAJI MOHD EUSOFF BIN CHIN,
KETUA HAKIM NEGARA
YANG AMAT ARIF DATO' WAN ADNAN BIN ISMAIL,
HAKIM BESAR MALAYA
YANG ARIF DATO' DR ZAKARIA BIN MOHD YATIM, H.M.P.

PADA MAHKAMAH TERBUKA
PADA 22 HARIBULAN DISEMBER 2000

PERINTAH

ATAS RAYUAN yang dikemukakan kepada Mahkamah pada hari ini oleh Dr Cyrus Das (dengan Encik CK Tan dan Encik Mohandass bersamanya) peguam bagi pihak Pemohon-Pemohon dengan kehadiran Encik SS Muker peguam bagi Responden (dengan Encik Satvinder Singh bersamanya) **DAN SETELAH MEMBACA** Rekod Rayuan yang difailkan di sini **DAN SETELAH MENDENGAR** peguam-peguam tersebut **ADALAH DIPERINTAHKAN** bahawa rayuan oleh Perayu-Perayu dibenarkan dengan kos di sini dan di Mahkamah Rayuan dan Mahkamah Tinggi, Shah Alam dan perintah-perintah berikutnya diberikan:

(a) Responden dikehendaki dalam masa Empatbelas (14) hari dari tarikh perintah ini mengarahkan Setiausaha Syarikat untuk mengemukakan dan/ atau menghantar-serah segala buku-buku statutori dan dokumen-dokumen syarikat Peringkat Juta (M) Sdn Bhd yang lain kepada Perayu;

(b) Responden secara segera dikehendaki untuk menandatangani Borang Pindahmilik (Borang 32A) bagi semua saham-saham syarikat kepada Perayu dan mengemukakan cop mohor bersama-sama dengan sijil-sijil saham kepada Perayu.

(c) Responden dan syarikat dikehendaki untuk mengemukakan resolusi yang diperlukan dan membuat segala tindakan dan dokumen untuk menguatkuasakan perintah-perintah tersebut.

(d) Sekiranya responden dan/atau Setiausaha Syarikat gagal untuk melaksanakan dan menunaikan sebarang perintah-perintah tersebut, Penolong Kanan Pendaftar Mahkamah Tinggi diberikuasa untuk melaksanakan segala tindakan yang perlu.

DIBERI di bawah tandatangan saya dan meterai Mahkamah pada 22 haribulan Disember 2000.

T.T.
TIMBALAN PENDAFTAR
MAHKAMAH PERSEKUTUAN MALAYSIA
KUALA LUMPUR

Proceedings Before The Court

It was the respondents' case that the judgment of the court dated 19 December 2000 was a nullity because when the judgment was pronounced by the Deputy Registrar in open court on 22 December 2000 there was only one judge remaining who was capable of exercising his functions as a judge of that court, the other two having retired as judges before 22 December 2000.

It is not disputed that Tun Mohd Eusoff bin Chin and Tan Sri Wan Adnan bin Ismail signed the decision of the court on 19 December 2000. However, when the judgment was pronounced on 22 December 2000, both Tun Mohd Eusoff Chin and Dato' Zakaria Mohd Yatim, FCJ had already retired. Therefore, when the decision was pronounced by the Deputy Registrar in open court on 22 December, the only remaining judge who formed the coram was Tan Sri Wan Adnan, Chief Judge Malaya.

Encik Cecil Abraham, for the respondents, submitted that the effective date of the judgment is when it is pronounced in open court. He relied on r. 63 of the Rules of the Federal Court 1995 (the Rules) which states:

(1) **The judgment of the Court shall be pronounced in open Court,** either on the hearing of the appeal or at any subsequent time, of which notice shall be given by the Registrar to the parties to the appeal.

> (2) Such judgment may **be pronounced** notwithstanding the absence of the Judges who composed the Court or any of them, and the judgment of any Judge not present **may be read by a Judge of the Court or by the Registrar.** (emphasis added.)

Encik Cecil Abraham relied heavily on *Surendra Singh & Ors. v. State of Uttar Pradesh* AIR [1954] SC 194 which was followed by the Singapore Court of Criminal Appeal in *Ramachandran a/l Suppiah v. Public Prosecutor* [1992] 2 SLR 707.

In *Surendra Singh*, the question was whether the judgment could be validly delivered after the death of one of the two judges who heard the appeal. The Supreme Court of India held that a judgment is the final decision of the court intimated to the parties and to the world at large by formal 'pronouncement' or 'delivery' in open court.

In *Ramachandran*, the applicants' appeals against conviction and sentence of death for murder were heard by the Court of Criminal Appeal on 13 April 1989. One of the judges who sat on the appellate bench during the hearing of the appeals then retired on 30 September 1989. The appeals were dismissed some 21 months later in a reserved judgment dated 10 January 1991 which was also signed by the retired judge. The applicants applied by way of criminal motion for an order, *inter alia*, that the judgment dated 10 January 1991 be declared invalid and the convictions be set aside. The Court of Criminal Appeal ordered that the appeals be reheard before a new Court of Criminal Appeal and gave the following reasons:

> In Pt V of the Supreme Court of Judicature Act (Cap 322) ('the Act'), s. 43 provides that for the purposes of 'hearing and determining' appeals under that part, the Court of Criminal Appeal 'shall be duly constituted if it consists of not less than 3 Judges or any greater uneven number of Judges'. Any other tribunal will not be a duly constituted Court of Criminal Appeal and so cannot have the powers and duties described in Pt V. The duty of such a duly constituted Court of Criminal Appeal is, *inter alia*, to hear and determine appeals in the manner prescribed in ss. 54 and 55, and then **'to deliver judgment in Open Court'** (s. 56(1)). Such judgment, then, may not be delivered by any other tribunal.
>
> We are of the view that though the Court of Criminal Appeal was duly constituted for the hearing of the appeal, the appellate tribunal which **delivered judgment** upon the applicants on 10 January 1991 was not a duly constituted Court of Criminal Appeal and was not competent to deliver that judgment pursuant to s. 56(1) of the Act.

> Furthermore it was not competent to determine the appeals, for that determination only occurred on the date of delivery of judgment. In *Surendra Singh & Ors. v. State of Uttar Pradesh*, Bose J said that **a judgment of the Court was the expression of the court's opinion at the time of delivery.** Until the time of delivery, a judge is entitled to change his mind as to what is to be delivered. **Therefore, any judge who delivers a judgment or causes it to be delivered by a brother judge must be in existence as a proper member of the Court at the moment of delivery.** (emphasis added)

Dato' Dr. Das, for the appellants, submitted that a judgment or decision is effective on the date when it is given by the judge and not when pronounced in open court. He relied on s. 78(1) of the Courts of Judicature Act 1964 (the Act) which states as follows:

> (1) If, in the course of any proceeding, or, in the case of a reserved judgment, at any time before delivery of the judgment, any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding or otherwise exercise his functions as a Judge of the Court, the hearing of the proceeding shall ... continue before, and judgment or reserved judgment, as the case may be, shall be given by, the remaining Judges of the Court, not being less than two, and the Court shall, for the purposes of the proceedings, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.

According to him the operative words of the section are **"shall be given"**, which means a judgment is given or delivered when it is signed by the remaining judges of the court. Counsel relied on *Bharat v. R* [1959] 3 All ER 292; *Muir v. IRC* [1966] 1 WLR 1269 at 1287; *W'Field Fr. Co. v. Steel Construction Co.* [1968] NZLR 680. After considering these authorities, however, I form the view that they were not of much assistance to the court because the ratios were founded on the particular rules and practice of the courts governing those cases and which even by analogy would not apply to the case before us. In *Williams v. Natural Life Foods* [1998] 2 All ER 577, 581, Lord Steyn stated:

> The sole purpose of the citation of the precedent is, or ought to be, the identification of a legal principle or rule which covers, or may arguably cover, the issue in the case to be decided.

Counsel further submitted that the court can only direct a rehearing under sub-s. (2) which reads:

> (2) In any such case as is mentioned in subsection (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceeding shall be reheard.

Dato' Das Dr. also raised a point on jurisdiction, which I shall comment shortly.

The primary question for decision is the effective date of the judgment. Is it the date of giving the judgment or the pronouncement of the judgment in open court?

In my opinion, there is a clear distinction between the giving of judgment under s. 78 of the Act and the pronouncement of the said judgment in r. 63 of the Rules. Section 78 provides that the judgment or reserved judgment shall be given by the remaining judges of the court, not being less than two, and in which case, the court shall be deemed to be duly constituted. This begs the question: **when** is the judgment of the remaining judges given? The section does not provide the manner in which and the time from when the judgment is to take effect. Rule 63 of the Rules seems to provide the answer. Clearly, r. 63 provides the mode how a judgment is to be delivered, which is, by pronouncement in open court and under para. (2) of r. 63, it may be read by a judge of the court or by the registrar. It seems that this was also the practice of the House of Lords where the pronouncement is made in open court in a formal way (*W'Field Fr. Co. v. Steel Construction Co., supra*, at p. 686). It must not be forgotten that the Rules have statutory force and are not mere rules of practice. See: *Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd* [1984] 2 CLJ 56.

In addition to the above, I also adopt the reasonings in *Surendra Singh* which the Singapore Court of Criminal Appeal in *Ramachandran* agreed with its analysis in relation to Singapore criminal cases.

In *Surendra Singh, supra*, the Supreme Court of India observed (at p. 195):

> Delivery of judgment is a solemn act which carries with it serious consequences for the person or persons involved. ... For that reason rules have been drawn up to determine the manner in which and the time from when the decision is to take effect and crystallise into an act which is thereafter final so far as the court delivering the judgment is concerned.

Further, at p. 196, the court held as follows:

> In our opinion, a judgment within the meaning of these sections is the final decision of the Court intimated to the parties and to the world at large by formal "pronouncement" or "delivery" in open court. It is a judicial act which must be performed in a judicial way. Small irregularities in the manner of pronouncement or the mode of delivery do not matter but the substance of the thing must be there: that can neither be blurred nor left to inference and conjecture nor can it be vague. All the rest – the manner in which it is to be recorded, the way in which it is to be authenticated, the signing and the sealing, all the rules designed to secure certainty about its content and matter – can

> be cured; **but not the hard core, namely the formal intimation of the decision and its contents formally declared in a judicial way in open Court**. The exact way in which this is done does not matter. In some Courts the judgment is delivered orally or read out, in some only the operative portion is pronounced, in some the judgment is merely signed after giving notice to the parties and laying the draft on the table for a given number of days for inspection.
>
> An important point therefore arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the Court as it is at the time of pronouncement. **We lay no stress on the mode or manner of delivery, as that is not of the essence, except to say that it must be done in a judicial way in open Court.** But however it is done it must be an expression of the mind of the Court at the time of delivery. We say this because that is the first judicial act touching the judgment which the Court performs after the hearing. Everything else up till then is done out of Court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. **The final operative act is that which is formally declared in open Court with the intention of making it the operative decision of the Court. That is what constitutes the "judgment."** (emphasis added)

For the reasons which I have given, I hold that the effective date of the judgment in the instant case is the date of pronouncement in open court and not the date when it was signed by the remaining two judges of the court.

Dato' Dr. Das also submitted that the Federal Court has no jurisdiction to re-open or rehear a case or review its own decision. Counsel relied on art. 128(3) of the Federal Constitution, which states that "the jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law." The Court of Judicature Act 1964 is such a law. He also referred to *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd* [1985] 2 CLJ 423 where Abdul Hamid CJ (Malaya), (as he then was) held as follows (at p. 427):

> Where, therefore, a final decision has been delivered, an appeal is in effect heard and disposed of. In other words, it is brought to a final conclusion. And that being the case, the Supreme Court has no power to reopen, rehear and re-examine its decision for whatever purpose. The only exception where there can be a re-hearing is only to the extent provided by section 42, in particular subsection (3) of section 42. The other exception is as provided under section 44 sub-section (3) to the effect that every order such as that envisaged in sub-section (1) of section 44 may be discharged or varied by the full Court.

Counsel further submitted that r. 137 of the Rules does not confer jurisdiction or power on the Federal Court.

In reply, Encik Cecil Abraham submitted that in the instant case the judgment was not given in accordance with the law, ie, under s. 78 of the Act and r. 63 of the Rules. This court has the inherent power to determine the issue in order to prevent injustice to the respondents.

With respect, I disagree with Dato' Dr. Das that this court has no jurisdiction to hear this application. Rule 137 of the Rules clearly gives us the inherent powers to hear any application or to make any order as may be necessary to prevent injustice. The issue of re-opening or reviewing our own decision in the instant case therefore does not arise.

Conclusion

For the above reasons, the application of the respondents for an order that the judgment dated 22 December 2000 be set aside, is allowed with costs because on that date the court was not duly constituted as there was only one remaining judge of the court. I also order that the application of the appellants to set aside the *ex parte* order dated 4 January 2001 allowing stay of execution be dismissed with costs. In the result, the appeal shall be reheard by a newly constituted panel of the Federal Court.

Lastly, I have shown this judgment in draft to my learned brothers, Tan Sri Steve Shim and Dato' Haidar, who agreed with my reasons and conclusion.